

JIMMY D. HUMBLE

V.

Respondent

TECHNOLOGY INSURANCE COMPANY

Docket No. 1,074,237

The order awarding claimant TTD did not make a specific finding that claimant's right wrist/hand injury or psychological injury arose out of and in the course of his employment. The order for an independent psychological evaluation stated, "The doctor

is asked to render an opinion regarding what, if any, additional psychological treatment is needed to cure and relieve the effects of a 1/21/13 accidental injury to [claimant].”¹

Respondent requests review of whether claimant’s alleged psychological injury arose out of and in the course of employment and is directly traceable to his physical injury and whether the ALJ exceeded his authority ordering an independent psychological evaluation. Respondent also requests review of whether the ALJ exceeded his authority ordering TTD to be paid from the date of the hearing until an IME report is received. Respondent requests the Board reverse the ALJ’s order for TTD and psychological treatment.

Claimant requests the Board affirm the ALJ’s Order.

Issues on Appeal are:

1. Does the Board have jurisdiction to review preliminary orders for an independent psychological evaluation or for TTD?
2. Did claimant’s alleged psychological injury arise out of and in the course of employment and is it directly traceable to his accident and physical injury?

FINDINGS OF FACT

Claimant appeared at the preliminary hearing *pro se*. The ALJ conducted direct testimony of claimant. Claimant testified he worked at KES Construction (respondent) as the superintendent. Claimant earned \$30 per hour and worked 40 hours per week with some overtime. On January 21, 2013, claimant ripped a two-by-four in half with a skill saw, when it kicked back and cut his left thumb, index finger and middle finger.

Claimant received treatment for his left hand from Dr. Neal D. Lintecum, who performed two surgeries and provided claimant several weeks of physical therapy.

Around one week after his accident, claimant returned to work for respondent. Claimant continued to work his normal full duty job with no accommodations, but had issues performing his job. Claimant indicated he was terminated from his job with respondent in February 2014, although no one told him he was terminated. Claimant finished the job he was working on and respondent did not call him back for another job.

¹ ALJ Order Referring Claimant for Independent Medical Evaluation (July 28, 2015) to Dr. James Eyman, at 1.

After a time, Lonnie Ralston² called claimant to ask him to return a laptop. Claimant asked Mr. Ralston why respondent hired another superintendent when he was “in the soup line.”³ Mr. Ralston did not say why claimant was terminated and told him to keep the laptop.

After he was terminated, claimant tried to do odd jobs. He worked for Francis Zeller for four months remodeling a restroom. Claimant worked 20 hours per week on the remodel job and made \$800. Claimant worked until May 2014. Since then, he has not worked, but has continuously applied for jobs.

A single treatment note from Dr. Lintecum dated July 21, 2014, and letters written by the doctor dated November 14, 2014, and March 11, 2015, were placed into evidence. The July 21, 2014 note, indicated claimant “was busy and having some struggles with depression but he is doing better now.”⁴ Dr. Lintecum’s November 14, 2014, letter stated claimant underwent extensive surgery in January 2013. The letter indicated claimant reached maximum medical improvement (MMI), and pursuant to the *AMA Guides*,⁵ claimant had a 47 percent left upper extremity functional impairment.

On his own, claimant saw Dr. Pedro A. Murati on May 27, 2015. The doctor made several diagnoses, including right wrist sprain secondary to overuse and sprain of claimant’s third MCP secondary to overuse. Dr. Murati indicated claimant was at MMI and, in accordance with the *AMA Guides*, assigned claimant 33 percent left upper extremity and 8 percent right upper extremity functional impairments. These ratings combine to a 24 percent whole person impairment. Dr. Murati provided claimant with work restrictions and recommended physical therapy, anti-inflammatory and pain medications for claimant’s right wrist sprain. The doctor recommended yearly follow-up visits for claimant’s hands.

The ALJ asked claimant if he developed problems in his right hand because of using his right hand to compensate for his inability to use his left hand, and claimant answered in the affirmative. Claimant indicated he began having right hand symptoms in the summer of 2014. As a result of claimant’s left hand injury, he uses his right hand to do everything. He only has two fingers on his left hand to use so when he lifts, the right hand must do everything.

The ALJ asked claimant what symptoms of depression he was having. Claimant indicated everything is depressing. He is frustrated by taking ten minutes to button a

² Mr. Ralston’s position with respondent was not identified.

³ P.H. Trans. (July 28, 2015) at 14.

⁴ *Id.* Cl. Ex. 4.

⁵ American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

long-sleeved shirt. Claimant used to play guitar in a band every weekend for two or three hundred dollars, but cannot play chords anymore and it is depressing. Claimant is sad, hurt, disappointed, and frustrated. Claimant testified he is worse now because no one wants to hire a crippled carpenter who cannot lift more than 30 pounds. Claimant indicated he cannot do keyboard work, so no employer can accommodate him. Claimant testified Drs. Murati and Lintecum suggested to him that he had depression. Claimant did not complain to Dr. Lintecum about depression and did not think about his depression as part of his symptoms.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2013 Supp. 44-551(l)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

Respondent asserts the ALJ exceeded his authority by issuing an order requiring claimant to undergo an independent psychological evaluation. The ALJ's order for an independent psychological evaluation does not establish compensability, nor is it an order for medical treatment. Thus, the order is neither a preliminary award of benefits entered under the preliminary hearing statute, nor is it a final award. The Board has previously held

that an order for an IME is an interlocutory order.⁶ Therefore, the Board has no jurisdiction to review this issue.

Respondent contends the ALJ exceeded his authority by awarding TTD from July 28, 2015, until Dr. Ketchum's IME report is received. K.S.A. 2013 Supp. 44-534a(a)(2) grants a judge jurisdiction to decide issues concerning payment of medical compensation and TTD compensation. K.S.A. 2013 Supp. 44-534a also specifically gives the judge authority to grant or deny the request for TTD compensation pending a full hearing on the claim. "Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly."⁷

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2013 Supp. 44-551 and issues listed in K.S.A. 2013 Supp. 44-534a(a)(2) as jurisdictional issues, which are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.⁸

The ALJ had the authority to award claimant TTD. Whether claimant is entitled to TTD is not one of the four issues delineated in K.S.A. 2013 Supp. 44-534a(a)(2), which the Board has jurisdiction to review.

Respondent requests review of whether claimant's alleged depression arose out of and in the course of employment and is directly traceable to his physical injury. The ALJ never made a determination claimant's alleged depression arose out of and in the course of employment and is directly traceable to his physical injury. The order for an independent psychological evaluation states, "The doctor is asked to render an opinion regarding what, if any, additional psychological treatment is needed to cure and relieve the effects of a 1/21/13 accidental injury to [claimant]."⁹

⁶ See, e.g., *Scott v. Total Interiors*, No. 244,761, 2000 WL 1134444 (Kan. WCAB July 28, 2000); *Kitchen v. Luce Press Clippings, Inc.*, No. 228,213, 1999 WL 288895 (Kan. WCAB Apr. 2, 1999); and *Jones v. Community Living Opportunities*, No. 1,049,316, 2011 WL 2693256 (Kan. WCAB June 22, 2011).

⁷ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁸ See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁹ ALJ Order Referring Claimant for Independent Medical Evaluation (July 28, 2015) to Dr. James Eyman at 1.

The word “additional” could imply the ALJ found claimant’s alleged depression arose out of and in the course of employment and is directly traceable to his physical injury and that claimant has already received psychological treatment. This Board Member believes the aforementioned language was “boilerplate” or standard language used by the ALJ in orders for independent medical and psychological evaluations. The ALJ did not make a determination that claimant’s alleged depression arose out of and in the course of his employment. Therefore, that is not yet an issue for the Board.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSION

1. When the record reveals a lack of jurisdiction, the Board’s authority extends no further than to dismiss the action.¹¹ Accordingly, respondent and carrier’s appeal on the issues of whether the orders awarding TTD and ordering an independent psychological evaluation are dismissed.
2. The ALJ never determined if claimant’s alleged depression arose out of and in the course of employment and if it is directly traceable to his accident and physical injury. Therefore, that is not an issue appealable to the Board.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that respondent’s appeal is dismissed.

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

¹⁰ K.S.A. 44-534a(a)(2).

¹¹ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

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Honorable Brad E. Avery, Administrative Law Judge